Hearing Date: March 7, 2017
Time: 2:00 p.m.

ROSEN & ASSOCIATES, P.C.
Attorneys for the Debtor
and Debtor in Possession
747 Third Avenue
New York, NY 10017-2803
(212) 223-1100
Nancy L. Kourland

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In re	Chapter 11
YBRANT MEDIA ACQUISITION, INC.,	Case No. 16-10597 (SMB)
Debtor.	

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DEBTOR'S OBJECTION TO MOTION OF DAUM GLOBAL HOLDINGS CORP. TO DISMISS CHAPTER 11 CASE

TO THE HONORABLE STUART M. BERNSTEIN,
UNITED STATES BANKRUPTCY JUDGE:

Ybrant Media Acquisition, Inc., the above-captioned debtor and debtor in possession (the "**Debtor**"), by its attorneys, Rosen & Associates, P.C., as and for its objection to the motion (the "**Motion**") of Daum Global Holdings Corp. ("**Daum**") to dismiss its chapter 11 case, respectfully represents:

PRELIMINARY STATEMENT

1. In the Motion, Daum alleges that "cause" exists to dismiss the Debtor's chapter 11 case, pursuant to section 1112(b) of the Bankruptcy Code, because the Debtor filed its petition in "bad faith." Daum alleges that it is utterly improbable "that a company so strapped with debt and devoid of assets as the Debtor could expect in good faith to be revived and reorganized in Chapter 11." *Motion* at 12. Citing *C-TC Avenue Partnership v. Norton Company*

(*In re C-TC 9th Avenue Partnership)*, 113 F.3d 1304 (2d Cir. 1997), Daum asserts that "[t]he CTC factors are present here: (i) Debtor has one asset, the 56% of Lycos shares, that are subject to Daum's lien, which far exceeds the value of the shares; (ii) [i]t has one creditor, Daum, for some $37 million; (iii) [i]t has no employees, no assets, no source of revenue, and no cash flow. (iv) [sic] Moreover, as in CTC, 'the timing of the Debtor's resort to Chapter 11 evidences an intent to delay or frustrate the legitimate efforts of the debtor's secured creditors to enforce their rights.'" *Motion at 12.*

2. Daum also asserts, in the alternative, that "cause" exists under section 1112(b)(4)(A) of the Bankruptcy Code, because "the Lycos business itself continues to lose value" and the Debtor does not have a reasonable likelihood of rehabilitation. *Motion* at 16. Daum alleges that "some eleven months have gone by and the Debtor and its Indian parent have been unable to produce the funds to enable any settlement [with [Daum]." *Motion* at 9. Daum also asserts that the Debtor's proposed plan of reorganization offers no prospect of independent survival for the Debtor but would depend on . . . an injection of funds into the Debtor which would have to be borrowed by the Indian parent . . . Without such a borrowing the plan is a nonstarter, yet we have had no corroboration that such a borrowing is feasible." *Id.*

3. According to Daum, "[t]he terms of the alleged White Oak financing reinforce the negative prospect of the Debtor's rehabilitation because "such a deal would require approval of Judge Nathan of the Southern District and Judge Oing of New York State Supreme Court . . . [and] neither White Oak nor the Debtor has made any approach to Daum in such regard." *Motion* at 13-14. Daum also questions the credibility of Mr. Reddy's representations to this Court concerning the efforts he has made since the petition date on behalf of Lycos to fund the Debtor's plan of reorganization, first, by attempting to obtain an international standby letter

of credit and, most recently, by executing a letter of intent with White Oak. As evidence of Mr. Reddy's lack of credibility, Daum points to testimony given by Mr. Reddy in connection with the ICC Arbitration and "the $175 million that Mr. Reddy failed to find in the Experian/Price Grabber acquisition in 2012 . . . ." *Motion* at 13.

4. As discussed more fully below, Daum has failed to meet its burden to demonstrate by a preponderance of the evidence either (a) the Debtor's "bad faith" or (b) that there is a substantial or continuing loss to or diminution of the Debtor's estate *and* a lack of a reasonable likelihood of rehabilitation.

BACKGROUND

5. On December 20, 2016, this Court entered an order approving the Debtor's Second Amended Disclosure Statement with Respect to the Debtor's Amended Plan of Reorganization dated December 6, 2016 [Document No. 46] and scheduling a hearing to consider confirmation of such plan for January 26, 2017 (the "**Confirmation Hearing**").

6. Thereafter, on January 25, 2017, the Debtor submitted the Declaration of Suresh K. Reddy, Pursuant to 28 U.S.C. § 1746, in Support of Request for an Adjournment of the Debtor's Confirmation Hearing and in Response to Objection of Daum Global Holdings Corp. to Confirmation of the Debtor's Plan of Reorganization (the "**January 2017 Declaration**") [Document No. 54].

7. In the January 2017 Declaration, Mr. Reddy, both in his capacity as the Chief Executive Officer of the Debtor and Lycos Internet, Ltd. ("**Lycos**"), the Debtor's parent, requested that this Court adjourn for a period of sixty (60) days the Confirmation Hearing to permit White Oak Global Advisors, LLC ("**White Oak**") to complete its due diligence, issue its commitment letter, and close on the $150 million senior secured debt financing (the

"**Financing**"), certain proceeds of which will be used by Lycos to fund the Debtor's Amended Plan of Reorganization dated December 6, 2016. *January 2017 Declaration* at ¶ 2.

8. In the January 2017 Declaration, Mr. Reddy stated that White Oak was nearing completion of its financial due diligence, had just provided Lycos with its legal due diligence requests, and intended to shortly commence its operational due diligence, consisting of site visits and management interviews. *January 2017 Declaration* at 3. Mr. Reddy stated that Acquisto Financial Advisory, LLP ("**Acquisto**"), Lycos' broker, had informed him that it believed that a closing of the Financing would occur no later than March 31, 2017.

9. Mr. Reddy also provided this Court with a schedule setting forth each of White Oak's information requests, as well as the respective dates on which Lycos submitted its responses.

10. In response to Mr. Reddy's request for an adjournment, Daum filed a letter objection (the "**Letter Objection**") on January 25, 2017 in which it reiterated its belief that Lycos "is seeking to drag out the chapter 11 proceedings to prevent Daum from regaining possession of the Lycos shares on which it holds a lien pursuant to Judge Nathan's Turnover Order,[1] to continue draining value from the United States activities, . . . and ultimately forcing Daum to emerge from this situation, not as an unimpaired creditor as suggested in the debtor's proposed plan, but as a creditor forced to accept a meager settlement or ownership of the Lycos subsidiary at a scrap of its original value."[2] *Letter Objection* at 1-2.

[1] The Debtor has reviewed the legal basis for Daum's assertion that it has a lien on the Debtor's assets and is in agreement with Daum. Although the classification of Daum's claim under the Amended Plan would change, its treatment would not.

[2] The Amended Plan does not impair Daum's claim. While the Amended Plan provides for payment in full of Daum's claim or payment pursuant to the terms of an agreement with Daum, as Daum well knows, the Financing is necessary to fund the Debtor's payment obligation under a settlement that Daum has represented it is prepared to accept once the Financing has closed.

11. At the Confirmation Hearing, this Court stated that certain of the information contained in the January 2017 Declaration was hearsay, invited Daum to file a motion to dismiss the Debtor's chapter 11 case, scheduled an evidentiary hearing for March 7, 2017, and directed the Debtor to bring witnesses who could testify as to the status of the Financing.

LEGAL ARGUMENT

The Debtor Did Not Commence its Chapter 11 Case in "Bad Faith"

12. "As the movant, [Daum] has the burden of producing evidence that there is 'cause' for relief under § 1112(b). Thereafter, if that burden is met, the Debtor must show that the relief is not warranted." *In re RCM Global Long Term Capital Appreciation Fund, Ltd.*, 200 B.R. 514, 519 (Bankr. S.D.N.Y.1996) (citing *In re Lizeric Realty Corp.,* 188 B.R. 499, 503 (Bankr.S.D.N.Y.1995)).

13. The principle that a chapter 11 case can be dismissed as a "bad faith" filing is a judicial doctrine and, in this Circuit, the leading case on dismissal for the filing of a petition in "bad faith" is *C–TC 9th Ave. Partnership*, which in turn relies on *Baker v. Latham Sparrowbush Assocs. (In re Cohoes Indus. Terminal, Inc.),* 931 F.2d 222 (2d Cir.1991). Under these decisions, grounds for dismissal exist if it is clear *on the filing date* that "'there was no reasonable likelihood that the debtor intended to reorganize and no reasonable probability that it would eventually emerge from bankruptcy proceedings.'" *In re General Growth Properties, Inc.*, 400 B.R. 43, 56 (Bankr. S.D.N.Y. 2009) ((quoting *In re C–TC 9th Ave. Partnership,* 113 F.3d at 1309–10) (quoting *In re Cohoes,* 931 F.2d at 227 (internal citations omitted)).

14. As stated by Judge Brozman in *In re Kingston Square Assocs.*, 214 B.R. 713, 725 (Bankr.S.D.N.Y.1997), "the standard in this Circuit is that a bankruptcy petition will be

dismissed if *both* objective futility of the reorganization process *and* subjective bad faith in filing the petition are found." (emphasis in original); *see also In re RCM Global Long Term Capital Appreciation Fund, Ltd.,* 200 B.R. at 520. The objective futility standard is designed to ensure that the debtor actually has a potentially viable business in place to protect and rehabilitate. Lacking this, the chapter 11 case has lost its *raison d'etre. RCM Global,* 200 B.R. at 520 *(citing Matter of Little Creek Development Corp.,* 779 F.2d 1068, 1073 (5th Cir.1986)).

15. "Importantly, no one factor is determinative of good faith and a bankruptcy court "must examine the facts and circumstances of each case in light of several established guidelines or indicia, essentially conducting an 'on-the-spot evaluation of the Debtor's financial condition [and] motives.'" *In re Kingston Square,* 214 B.R. at 725 (quoting *In re Little Creek Development Co.,* 779 F.2d 1068, 1072 (5th Cir.1986)). "It is the totality of circumstances, rather than any single factor, that will determine whether good faith exists." *In re Kingston Square,* 214 B.R. at 725 (citing *Cohoes,* 931 F.2d at 227).

16. In addition, courts recognize that a bankruptcy petition should be dismissed for lack of good faith only sparingly and with great caution. *See Carolin Corp. v. Miller,* 886 F.2d 693, 700 (4th Cir.1989); *see also In re G.S. Distrib., Inc.,* 331 B.R. 552, 566 (Bankr.S.D.N.Y.2005).

17. Here, Daum relying on *C–TC 9th Avenue Partnership,* which, like many of the other bad faith cases, involved a single-asset real estate debtor, asserts that many of the *C-TC* indicia are present. It correctly points out that: (a) the Debtor has one asset; (b) the Debtor has one (1) creditor; (c) the Debtor has no employees, no assets, no source of revenue, and no cash flow; and (d) the timing of the Debtor's filing evidences an intent to delay or frustrate the legitimate efforts of Daum to enforce its rights. *Motion* at 12. According to Daum, because the

Debtor lacks the usual indicia of an enterprise, it cannot be rehabilitated. Daum, however, is incorrect because the *C-TC* factors "ultimately do no more than assist the exercise of discretion in deciding when a debtor has improperly invoked the Bankruptcy Code, or is improperly hiding behind the automatic stay to speculate with the creditor's collateral, because it is not able, or not trying, to confirm a chapter 11 plan." *In re 68 West 127 Street, LLC*, 285 B.R. at 844.

18. Here, the Debtor does not fit into the recurring pattern of an operating enterprise. It is an investment vehicle that can operate "without the need of hiring many employees, investing in equipment, leasing office or factory space, or purchasing services or goods from outside vendors, all the traditional indicia of a typical corporate enterprise." *RCM Global*, 200 B.R. 520. Consequently, Daum must establish that the Debtor does not have a viable business that can be rehabilitated and that remaining in chapter 11, therefore, is objectively futile. Daum has made no such showing and apparently has conflated the issue of whether the Debtor has a viable business with whether the Amended Plan is feasible. As in *RCM Global*, "[t]he Debtor's business is viable, but whether it will have access to the funds which are a predicate to its rehabilitation remains to be seen. Nonetheless, based on the Debtor's stated intent and apparent ability to reorganize I find that the Debtor has survived the objective futility test." *RCM Global*, 214 B.R. at 521-22.

19. Daum also has failed to meet its burden to demonstrate the Debtor's subjective "bad faith" and has provided no evidence that the Debtor commenced its chapter 11 petition to frustrate and avoid paying Daum. In fact, the evidence demonstrates that the Debtor commenced its chapter 11 case for the sole purpose of paying Daum under a plan of reorganization.

20. As set forth in the Declaration of Suresh K. Reddy pursuant to 28 U.S.C. § 1746 dated August 2, 2016 [Document No. 24] (the "**August 2016 Declaration**"), the Declaration of Suresh K. Reddy pursuant to 28 U.S.C. § 1746 dated November 16, 2016 [Document No. 33] (the "**November 2016 Declaration**"), and the January 2017 Declaration, each of which is incorporated herein by reference, the Debtor commenced its chapter 11 petition to preserve the *status quo* while it negotiated a settlement with Daum and obtained the necessary funding to pay Daum's claim under a confirmed plan of reorganization that does not impair Daum's claim.

21. As counsel for Daum is aware, Mr. Reddy was in contact with Daum immediately after the petition date and provided it with a letter of intent under which the Debtor would pay Daum $16 million on account of its claim; $5 million would be paid upon execution and $11 million one (1) year later with an international standby letter of credit to be posted at Daum's request to secure the deferred payment.

22. Moreover, immediately after the petition date, Mr. Reddy, as Chief Executive Officer of Lycos, began working to obtain such funding and, as set forth in the August 2016 Declaration and the November 2016 Declaration, negotiated with two (2) Indian banks to secure the letter of credit and also worked with Acquisto to identify alternative sources of capital in the event he was unsuccessful in obtaining such letter of credit. As Daum is aware, Lycos has executed a letter of intent with White Oak and has been working as expeditiously as possible to complete the due diligence process. Financial due diligence now is complete and legal and operational due diligence are underway.

23. Thus, there is no evidence to support Daum's contention that the Debtor commenced its chapter 11 case in "bad faith" for a fundamentally unfair purpose.

Daum Has Failed to Demonstrate Continuing Loss to or Diminution of the Estate and No Likelihood of Rehabilitation

24. Daum also has failed to meet its burden to demonstrate a continuing loss to or diminution to the Debtor's chapter 11 estate and a lack of a likelihood of rehabilitation.

25. Under section 1112(b)(4)(A) of the Bankruptcy Code, Daum "must prove not only a continuing loss to or diminution of the estate, but also that there is no likelihood of rehabilitation." *In re The AdBrite Corp.*, 290 B.R. 209, 214 (internal citation omitted). *See also In re 1031 Tax Group, LLC*, 374 B.R. 78, 93; *In re FRGR Managing Member LLC*, 419 B.R. 576, 582 (Bankr. S.D.N.Y. 2009). Courts must "evaluate losses on a case-by-case basis." *In re The AdBrite Corp.*, 290 B.R. 209, 214. To determine whether there is a continuing loss to or diminution of the estate, a court must make a full evaluation of the present condition of the estate, not merely look at the debtor's financial statements. A continuing loss or diminution of the estate may be tolerated where reorganization is feasible and the pattern of unprofitable operations can be reversed as a result of a successful reorganization. *Id.*

26. Thus, courts regularly find a continuing loss or diminution of the estate where a debtor has a negative cash flow and an inability to pay current expenses. *See, e.g., In re Denrose Diamond*, 49 B.R. 754, 756 (Bankr.S.D.N.Y.1985); *In re 3868–70 White Plains Road, Inc.*, 28 B.R. 515 (Bankr.S.D.N.Y.1983); *In re Photo Promotion Associates, Inc.*, 47 B.R. 454, 459; *In re Pied Piper Casuals, Inc.*, 40 B.R. 723 (Bankr. S.D.N.Y. 1984); *In re The AdBrite Corp.*, 290 B.R. 209, 214.

27. In addition to establishing a continuing loss or diminution of the estate, a party moving under section 1112(b) of the Bankruptcy Code must establish the absence of a reasonable likelihood of rehabilitation. Courts in this Circuit uniformly construe "rehabilitation"

to mean "to put back in good condition and reestablish on a sound basis. It signifies that the debtor will be reestablished on a secured financial basis, which implies establishing a cash flow from which its current obligations can be met." *In re 1031 Tax Group, LLC*, 374 B.R. at 93; *In re BH S & B Holdings, LLC*, 439 B.R. 342, 348 (Bankr. S.D.N.Y. 2010).

28. Finally, although "a court may find that adequate "cause" exists to convert or dismiss a case, case law makes clear that the court still has discretion in deciding whether to grant or deny the motion . . . ." *In re BH S & B Holdings, LLC*, 439 B.R. at 347.

29. Here, Daum has failed to offer any evidence in either the Motion or the supporting affidavit of Bo-Yong Park, Esq. that there is a continuing loss to or diminution of the Debtor's estate, which consists of 4,905,498 shares of Lycos Internet, Inc. It merely asserts "the Lycos business itself continues to lose value." *Motion* at 16. There is no evidence that the value of the shares, which Daum estimates to be approximately $6.4 million, has diminished since the petition date.

30. Without evidence of this, Daum cannot prevail under section 1112(b)(4)(A) of the Bankruptcy Code.

31. Even if Daum could satisfy this prong, it has not met its burden to demonstrate that there is no reasonable likelihood of rehabilitation. As set forth above, "rehabilitation" means "to put back in good condition and reestablish on a sound basis. It signifies that the debtor will be reestablished on a secured financial basis, which implies establishing a cash flow from which its current obligations can be met." *In re 1031 Tax Group, LLC*, 374 B.R. at 93. As an investment vehicle, the Debtor's rehabilitation is the Financing itself.

32. Here, it is obvious that Daum filed the Motion because it doubts the veracity of Mr. Reddy's statements concerning the Financing and believes it should not have to "pay the price of vain delay" *Motion* at 16. Daum repeatedly questions Mr. Reddy's truthfulness regarding the Financing and urges this Court to "not give much weight to non-binding term sheets or letters of intent regarding outside financing presented by the Debtor and Ybrant Digital." *Id.*

33. Contrary to Daum's assertion, Lycos has successfully raised approximately $100 million through a combination of equity and debt financing since 2005, the proceeds of which Lycos has used to fund its acquisitions. A schedule setting forth Lycos' institutional borrowings is annexed hereto as Exhibit "A" and a schedule setting forth Lycos' corporate acquisitions is annexed hereto as Exhibit "B." Daums's allegation that Lycos' history as an unsuccessful borrower is indicative of the unlikelihood that it will obtain the Financing is a *non sequitur*.

34. Secondly, contrary to Daum's assertion, Mr. Reddy has not "misrepresented to the Court multiple times." *Motion* at 14. While Mr. Reddy miscalculated how long it would take to close the Financing, his belief was not a "misrepresentation" to this Court. Rather, Mr. Reddy believed in good faith that Lycos could satisfy all of White Oak's requirements in a time frame that would enable the Financing to close when he anticipated it would. Unfortunately, the financing has not proceeded at that pace.

35. Finally, Daum points to the fact that White Oak has not yet contacted it as "evidence" of a lack of a likelihood of rehabilitation. However, this, too, is not sufficient to demonstrate by a preponderance of evidence that the Debtor lacks a likelihood of rehabilitation. In fact, since Lycos received White Oak's legal due diligence request list on January 23, 2017, it

has responded as quickly as possible on behalf of itself and eleven (11) of its subsidiaries and provided White Oak with most of the requested documents. The Debtor anticipates that White Oak will contact Daum in due course and anticipates that White Oak's operational due diligence, consisting of site visits and management meetings will be complete by the end of March 2017 and that the Financing will close shortly thereafter.

36. Based on the above, the Motion must be denied in its entirety.

WHEREFORE, the Debtor respectfully request that this Court deny the Motion and grant it such other and further relief as this Court deems just and proper.

Dated: New York, New York
February 28, 2017

ROSEN & ASSOCIATES, P.C.
Attorneys for the Debtor
and Debtor in Possession

By: /s/ Nancy L. Kourland
Nancy L. Kourland

747 Third Avenue
New York, NY 10017-2803
(212) 223-1100